UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

In the Matter of : ENTERGY NUCLEAR OPERATIONS, INC., Respondent, And UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, INTERNATIONAL UNION, LOCAL 25 Charging Party.	CASE: 01-CA-153956 01-CA-158947 01-CA-165432

Respondent Entergy Nuclear Operations, Inc.'s Post-Hearing Brief to the Administrative Law Judge

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I. Introduction

Respondent Entergy Nuclear Operations, Inc. ("Respondent" "Employer" or "Entergy") respectfully submits this Post Hearing Brief in support of its position that General Counsel has not proven any violation of the National Labor Relations Act (the "Act"); accordingly, the Complaint should be dismissed in its entirety.

The facts surrounding this case are straightforward. Entergy operates the Pilgrim Nuclear Power Station ("Pilgrim" or "PNPS") located in Plymouth, Massachusetts. Pilgrim is a heavily guarded, highly secure nuclear power plant. The reasons for the heightened level of security are self-evident: any threat, including a terrorist threat, carried out against Pilgrim could have a significant impact on public health and safety.

As the licensee of a nuclear power plant, the Employer is regulated by federal and state law, including regulations promulgated by the Nuclear Regulatory Commission ("NRC"). (Respondent's Exhibits 2 and 3). The NRC regulations require that the Employer have in place a security force which must be well-trained and fully-armed, and capable of protecting the nuclear plant at all times. *Id.* The Employer's security officers at Pilgrim, represented by the United Government Security Officers of America, Local 25 (the "Union"), are not ordinary security guards patrolling an office building or shopping mall, but are part of a paramilitary unit, and are heavily armed. Further, as a licensed operator of a nuclear power station, Entergy must provide its employees with a respectful work environment, "so that [t]rust and respect permeate the organization", consistent with the NRC's

Safety Culture Policy Statement and the standards against which the NRC inspects and enforces. (Respondent's Exhibit 4).

On Friday morning, March 13, 2015, Jamie Amaral, one of Pilgrim's security officers, initiated a Condition Report concerning the removal of a water cooler. (General Counsel's Exhibit 9(a)). Ms. Amaral initated a second Condition Report on Saturday, March 14, 2015. (General Counsel's Exhibit 9(b)). The record reveals that in the first business day following Ms. Amaral's filing, her Condition Reports were reviewed in accordance with Entergy policy, and thereafter steps were promptly taken to address her concerns. (Tr. 320–22).

The verbal warning issued to Ms. Amaral had nothing to do with her filing of Condition Reports. Rather, she was issued the lowest possible form of discipline after she engaged in a gratuitous and unprovoked tirade against another employee, Kristie Lowther. While armed with her gun and visibly upset, Ms. Amaral cornered Ms. Lowther in the bathroom and engaged in a profanity-laced tirade that spilled into the hallway. (Tr. 346–47; Respondent's Exhibit 9). Ms. Amaral's behavior was such that Ms. Lowther felt compelled to exit the bathroom and take a longer route back to her office, so as to pass by Ms. Amaral's supervisor if necessary. (*Id.*). Ms. Amaral pursued Ms. Lowther into a hallway in the Employer's main office building, where she continued to berate her. (Tr. 348–49).

Despite Ms. Amaral's behavior, Ms. Lowther attempted to informally resolve the matter with the Union. (Tr. 356–57; Respondent's Exhibit 9). However, the Union official she contacted indicated that he did not want to confront Ms. Amaral, as he

did not "need her yelling at him" (Respondent's Exhibit 9). When Ms. Lowther suggested that another Union official might be able to help, she was told that he "doesn't want her yelling at him either." (*Id.*). Thus, the Union refused to cooperate in informal resolution, and Ms. Lowther was compelled to report the incident to Human Resources and the PNPS Security Managers. (Respondent's Exhibit 10). Consequently, Gillian Taylor, Entergy's Lead Investigator from the Internal Audit department, investigated Ms. Amaral's behavior and, after a thorough investigation, found the behavior to be unacceptable at a nuclear facility. (Respondent's Exhibit 11). Ms. Amaral was issued a verbal warning—which is the lowest form of discipline in its progressive disciplinary process. (Tr. 199; General Counsel's Exhibit 10).

On June 11, 2015, the Union filed an unfair labor practice charge alleging violation of Section 8(a)(3) of the Act for disciplining Ms. Amaral "for unprofessionalism regarding language while acting in an official union capacity." (General Counsel's Exhibit 1(a)).

As discussed in Section V.5, below, this simple Section 8(a)(3) charge mushroomed into the instant case pursuant to which the Region, and clearly not the Charging Party, decided to challenge a number of the Employer's policies even though those policies played no role in Amaral's discipline and those policies, in many cases, are dictated by the NRC. (Tr. 210).

The NRC imposes on its licensees, such as the Respondent, the specific expectation of a "Respectful Work Environment," so that "[t]rust and respect

permeate the organization." (Tr. 298–299; Respondent's Exhibits 3, 4, 5, and 7). The policy language advanced by the NRC is intentional and specific, and results from a collaborative effort between the NRC and the nuclear industry to develop a "common language initiative." *Id*. This initiative is intended to establish consistent definitions and terms to describe a safety culture as a critical step in ensuring consistent development, implementation and monitoring of a nuclear safety environment. (Tr. 299). Further, the NRC assesses the strength of licensees' "Respectful Work Environment," along with of other Safety Culture traits, as part of its Reactor Oversight Process, its inspection and oversight program. (Tr. 275; Respondent's Exhibits 2 and 3).

The General Counsel's case appears to be premised on three alternative theories. First, the General Counsel contends that Ms. Amaral was disciplined in retaliation for her activities as a union steward in violation of Section 8(a)(3) of the Act. However, at no time from Ms. Amaral's initial confrontation with Ms. Lowther through the final issuance of discipline was Ms. Lowther or the investigators aware of Ms. Amaral's newly-granted status as shop steward. Further, the individuals who addressed Ms. Amaral's Condition Reports had no part in the discipline of Ms. Amaral and, indeed, addressed her Condition Reports promptly, pursuant to Entergy's procedures, and without knowledge of her confrontation with Ms. Lowther. (Tr. 320; 324). The evidence also shows that during the investigation of Ms. Amaral's misconduct, Ms. Amaral did not tell the investigator that she was a union steward nor did the investigator know about Ms. Amaral's union status until

after investigation was completed. (Tr. 389–90). Brenda Gailes, the Human Resources Manager who approved the discipline was unaware of Ms. Amaral's union status. (Tr. 441). Finally, the evidence in this case shows that not only was the subject of Ms. Amaral's tirade (i.e., Ms. Lowther) completely unaware of Ms. Amaral's union steward status, but in fact Ms. Lowther took steps to try to buffer Ms. Amaral from more severe discipline. (Tr. 350; 356–57; Respondent's Exhibit 9).

Second, the General Counsel posits that Ms. Amaral's tirade was protected conduct and that the discipline therefore violated Section 8(a)(1) of the Act. However, the evidence in this case shows that Ms. Amaral's conduct, directed at the Employee Concerns Program Coordinator in the bathroom and then pursing her into the building hallway to continue her profanity-laced tirade, was conduct that simply could not be tolerated at a nuclear plant. The evidence shows that Ms. Amaral's complaint concerned a water cooler that was not within the responsibility of Ms. Lowther and had already been raised in two Condition Reports prior to her confrontation with Ms. Lowther. (Tr. 318; 351; Respondent's Exhibit No. 9(a)–(b).) The record establishes that the discipline of Ms. Amaral was not because she raised the issue of the water cooler, but because of her behavior with Ms. Lowther was in contravention of the respectful workplace required by the NRC to prevent communication breakdowns that could lead to accidents. (Tr. 336). The General Counsel has failed to prove that Ms. Amaral's alleged protected concerted activity was a motivating factor in the discipline that she received. Indeed, the record overwhelmingly demonstrates that Pilgrim has a robust set of policies and

procedures pursuant to which employees are encouraged, trained, and required to bring to management's attention and/or to the direct attention of federal regulatory agencies employee concerns regarding safety and any other workplace matter. It was not the expression of concern about the water cooler that motivated the Employer to impose discipline in this case, it was the out of control and disrespectful conduct exhibited by Ms. Amaral.

Third, the General Counsel contends that even if Ms. Amaral was not disciplined because of union status or because she was engaged in activity protected by the Act, the Employer violated Section 8(a)(1) by maintaining overly broad work rules. It should be noted that the only policy under which Ms. Amaral was disciplined was the Respondent's Discrimination and Harassment Prevention Policy which is intended to maintain a "work environment that respects the dignity and worth of each individual" which mirrors the NRC's "respectful work environment" requirement. (General Counsel's Exhibit No. 15(b)). Other than the Discrimination and Harassment Prevention Policy and the Code of Entegrity,[1] the policies cited in the Second Amended Complaint have nothing to do with the discipline imposed on Ms. Amaral. (General Counsel's Exhibit No. 1 and 10).

To accept the General Counsel's theory of this case is to ignore the substantial expertise of the NRC regulators and to ignore the safety impact on a nuclear power plant that tolerates disrespect among its employees. The perverse result of the General Counsel's case is to not only endorse disrespectful conduct, but

[1] The Code of Entegrity is a compendium document that provides brief iterations of underlying policies and other contextual materials.

to compel revocation of the Employer's policies that are intended to comply with the NRC's expectations to maintain a free flow of information and thereby prevent significant nuclear accidents.

On this record: (1) there is no doubt that the Employer acted lawfully when it issued Jamie Amaral a verbal warning—the lowest possible form of discipline—following her confrontation with Entergy's Employee Concerns Program Coordinator; (2) Court and Board precedent foreclose General Counsel's allegations that Entergy's workplace policies violate the Act; and (3) the Employer disciplined Amaral pursuant to a lawful rule and not because of her status as a Union steward or alleged protected activity. There is no violation of the Act here.

II. Procedural History and Allegations in the Complaint

The simple Section 8(a)(3) charge (01-CA-153956) filed by the Union on June 11, 2015 was amended, and then consolidated with two other charges (01-CA-158947, as amended and 01-CA-165432, as amended) into the Second Amended Consolidated Compliant which was tried on October 17–October 19, 2016. (General Counsel's Exhibit 1).

The amendment to the original charge, and the subsequently-filed and amended charges, created a totem pole where the Region, and clearly not the Charging Party, kept adding the Employer's policies to the case without regard to the underlying facts of the Amaral matter, the requirements imposed by the NRC, or common sense. On the latter point, for example, the Region has challenged the Employer's Issue Resolution Policy, which, by its plain terms, applies only to "Non-

Bargaining Employees" defined as "employees not covered by union contracts." (General Counsel's Exhibit 15(f)).

The Complaint, as amended, alleges that Entergy violated Sections 8(a)(1), and (3) of the Act. Specifically, the Complaint alleges that the Respondent:

- Violated Section 8(a)(1) by maintaining its Code of Entegrity (Compl. ¶¶8; 17);
- Violated Section 8(a)(1) by maintaining its Harassment and Discrimination Policy (Compl. ¶¶9; 17);
- Violated Section 8(a)(1) by maintaining its Employee Use of Internal or External Social Media Sites Policy (Compl. ¶¶10; 17);
- Violated Section 8(a)(1) by maintaining its Protection of Information Policy (Compl. ¶¶11; 17);
- Violated Section 8(a)(1) by maintaining its Government Investigations Policy (Compl. ¶¶12; 17);
- Violated Section 8(a)(1) by maintaining its Issue Resolution Policy (Compl. ¶¶13; 17); and
- Violated Sections 8(a)(1) and (3) when it disciplined employee Jamie Amaral (Compl. ¶¶14–16; 18).

III. Statement of Facts

There are three main characteristics concerning the operation of Pilgrim that are particularly relevant to this case. First, Pilgrim is highly regulated by the NRC and other state and federal agencies. Second, the Employer and the regulating agencies place paramount importance on safety. Third, in order to raise and properly address any safety concerns, the Employer has established a robust reporting and complaint process pursuant to which employees are trained, encouraged, and required to bring forward concerns and complaints without fear of reprisal. (Tr. 311–12).

1. Regulatory Overview and Respectful Workplace

NRC regulations, policy statements, and guidance require licensees to promote a culture of safety through the maintenance of a respectful workplace. The NRC's Employee Protection Regulation (Respondent's Exhibit 2), codified at 10 CFR § 50.7, prohibits licensees, such as the Respondent, from discriminating against employees for engaging in certain protected activities as defined therein. A licensee who violates this requirement may have its license suspended or revoked. 10 CFR § 50.7(c)(1). As published in the Federal Register, the NRC has promulgated a Safety Culture Policy Statement. (Respondent's Exhibit 3). The Safety Culture Policy Statement sets forth nine (9) traits of a positive safety culture, one of which is "Respectful Work Environment-Trust and respect permeate the organization." As David Noyes, the Respondent's Recovery Director, testified "[t]he nine traits of a healthy nuclear safety culture were determined or were developed by the NRC, in concert with industry representatives, including the Institute of [Nuclear] Power Operations, to define the key traits … in order to be able to define attributes and behaviors that would be associated with an effective nuclear culture." (Tr. 297; Respondent's Exhibit 4).

The NRC, in conjunction with industry representatives, has developed an initiative known as "Safety Culture Common Language." As described by the NRC, this initiative was developed in response to serious safety violation incidents at the Peach Bottom Nuclear Plant and the Millstone Nuclear Power Station. (Respondent's Exhibit 5 at 1). As stated by the NRC, "[t]he safety culture common language described in this report builds on the U.S. Nuclear Regulatory

Commission's (NRC's) and the nuclear industry's ongoing focus on safety culture. It is the result of an attempt to harmonize differences in terms that different groups have used to describe a healthy nuclear safety culture." (*Id*. at 3). As indicated by the NRC, the use of specific and uniform language is important. One of those key terms is a "Respectful Work Environment." (*Id*.; Respondent's Exhibit 6). Its attributes are described, in part, by the NRC as follows: "Individuals at all levels of the organization treat each other with dignity and respect. Individuals treat each other with respect within and between work groups. Individuals do not demonstrate or tolerate bullying or humiliating behaviors." (Respondent's Exhibit 5 at 23).

The NRC also communicates to its licensees practical examples of Safety Culture Common Language. For example, the January 2015 edition of a NRC–published "Safety Culture Trait Talk" is devoted entirely to a "Respectful Work Environment," including the importance of this trait in the workplace. (Respondent's Exhibit 6.) "Trust and respect are fundamental to positive interpersonal relationships and central components of effective working relationships. The nature and level of trust and respect between workers and their managers and supervisors affect all aspects of their relationship and influence their attitudes and behaviors." (*Id*. at p. 1).

The Institute of Nuclear Power Operations ("INPO") is a nuclear industry group that provides a degree of industry self-regulation. (Tr. 308). INPO has published a pocket guide titled "Traits of a Healthy Nuclear Safety Culture." (Respondent's Exhibit 7). Mirroring the NRC publications, the INPO guide identifies a "Respectful Work Environment" as an essential trait of a healthy nuclear safety culture. (*Id.* at

30–33). Mr. Noyes testified that he carries the INPO pocket guide with him during the workday and that he frequently refers to it in meetings with employees and managers. (Tr. 309). Mr. Noyes' actions in this regard are commonplace for nuclear leaders across the industry.

2. Multiple Reporting Channels for Employees

As indicated repeatedly throughout the hearing, the safety culture at Pilgrim—as at all commercial nuclear plants in the United States—encourages open communication with employees and the ability of employees to bring forward complaints or concerns without fear of reprisal. Mr. Noyes identified six separate reporting channels available to employees of the Respondent who wish to bring forward concerns.

First, as referenced above, employees can bring concerns directly to the NRC and other federal agencies. (Tr. 317). NRC resident inspectors are physically located at the Pilgrim facility and have unfettered access to all parts of the plant. (Tr. 288). The NRC resident inspectors interact with the Respondent's executives and employees on a near–continuous basis. (Tr. 289). They attend routine meetings. (*Id.*) There are also regular weekly meetings with the NRC staff. (*Id.*) Respondent's employees are allowed to interact directly with the NRC staff with respect to workplace complaints. (*Id.*) As stated by Mr. Noyes, "the NRC's policies…requires individuals to be able to bring concerns directly to the Nuclear Regulatory Commission at any time that they see fit." (Tr. 290).

Second, employees may bring concerns to their respective unions by means of the contractual grievance process. In addition to the Security Officer's Union involved in this case, there are three other unions at Pilgrim. (Tr. 316).

Third, employees are encouraged and allowed to bring concerns directly to their managers. As Mr. Noyes testified, employees are informed of this reporting channel through repetitive training which is done on an annual basis. (*Id.*).

Fourth, employees are provided access to a dedicated Entergy reporting call center called the Entergy Ethics Line ("Ethics Line"). The Ethics Line provides employees a means to raise any concerns regarding violations of policies or procedures or other concerns. Employees may utilize the Ethics Line on an identified or anonymous basis. (Tr. 311–312).

Fifth, employees may utilize the Employee Concerns Program. (Tr. 312.) The Employee Concerns Program is staffed by a fulltime onsite Employee Concerns Program Coordinator. (*Id.*) The Employee Concerns Program Coordinator receives concerns brought forward by employees, and enters those concerns into a formal tracking program. *(Id.)* The Coordinator or an independent designee investigates and evaluates the matter. *(Id.)* The employee may submit a concern to the Employee Concerns Program on an identified or anonymous basis. *(Id.)* In 2015, approximately 135 to 140 employee concern cases were handled at Pilgrim. (Tr. 342). The Employee Concerns Program Coordinator is independent of management and serves as an advocate for employees and assists employees in raising concerns. (Tr. 341). The Employee Concerns Office is in a corner of the office building. "It's set

up that way so that people can come in and out and not have, you know, not be very visible to a lot of management. We try to have the employees be able to feel free to come in and leave without their manager or supervisor see them doing so." (Tr. 343). In March of 2015, Kristie Lowther served as the Employee Concerns Program Coordinator at the Pilgrim site. (Tr. 312).

Sixth, there is a Condition Report (commonly abbreviated as "CR") generation process. (Tr. 313). This process is intended to address adverse conditions on the site that could impact nuclear safety, as well as other concerns. *(Id.)* Condition Reports can be generated on an identified or anonymous basis. *(Id.)* It is a transparent system through which an employee who generates a Condition Report is able to monitor it throughout the process to determine the status of the report. (Tr. 313).

The Condition Report process involves review by coordinators in each of the key departments on a daily basis. (Tr. 318). The coordinators make recommendations with respect to prioritization and whether any immediate action needs to be taken. (Tr. 313–14). After the department coordinators perform preliminary screening, the CR goes to the Condition Report Review Group chaired by the General Manager of Plant Operations. (Tr. 314). The review group formally assigns disposition of the CR to an organization or an individual for resolution. (Tr. 314–15). All Condition Reports are tracked and processed, even those that are determined to be below the threshold of an adverse condition. (Tr. 315). In 2015, there were 9,980 Condition Reports filed at the Pilgrim Station. (Tr. 317). The range of Condition Reports filed

is from approximately 7,000 to 10,000 per year. *(Id.)* A group of employees and not just an individual employee may bring forward an employee concern. *(Id.)*

3. Jamie Amaral Berates Employee Concerns Program Coordinator Kristie Lowther

As noted above, in March of 2015, Kristie Lowther served as the Employee Concerns Program Coordinator at the Pilgrim Station. In the late afternoon of Friday, March 13, 2015, Ms. Lowther was in the restroom located on the first floor of the Plant's Engineering and Support Building, which is the main office building outside of Pilgrim's protected area. (Tr. 344). Ms. Amaral was in the restroom at the same time. (Tr. 345). Ms. Amaral complained to Ms. Lowther that they had taken the water bubbler out of the primary gate and Ms. Lowther observed that Ms. Amaral was upset. (Tr. 345). Ms. Lowther suggested that Ms. Amaral should consider writing a Condition Report or contacting the Maintenance Superintendent Bill Mock. *(Id.)* Ms. Amaral responded as follows: "it's fucking bullshit. I'm not going to write a CR – no, I already wrote a CR. It's fucking bullshit." (*Id.*)

Lowther observed that Ms. Amaral was upset and emotional and she was uncomfortable being in the same space with her. (*Id.*) During this conversation, Ms. Amaral was fully armed in her Security Officers uniform. (Tr. 346). The conversation got increasingly heated and Ms. Lowther decided that she needed to exit the restroom and she did so. (Tr. 346–47). In exiting the restroom, Ms. Lowther purposely turned to the left even though the most direct route back to her office was to the right. "It would make sense to go right to my office, but I felt that if it was going to continue on I wanted to head towards her supervisor's area, which is to the

left, because I figured if we needed to, I would just continue on to that path and we could finish the discussion with her supervisor present." (Tr. 347). Ms. Amaral followed Ms. Lowther out of the restroom into the hallway area, which is a visible and well-traveled area. (Tr. 348). It runs by conference rooms, a break room for facility technicians, an office area where two supervisors sit, and the credit union. (*Id.*) There is a mailroom with an open area opening into the hallway. (*Id.*) And there are vending machines which employees use for beverages and snacks. (Tr. 349). Ms. Lowther specifically recalled seeing an employee in the credit union at this time. *(Id.)* In the hallway, Ms. Amaral continued to yell at Ms. Lowther. (*Id.*) At the time of this incident, Ms. Lowther did not know that Amaral was a union steward. (Tr. 350). During their interaction on March 13, Ms. Amaral did not inform Lowther that she was a steward and did not inform Lowther that she was speaking on behalf of the Union or on behalf of other employees. (Tr. 350–51).

After this incident and before leaving for the day on Friday, March 13, Ms. Lowther went back to her office and typed up notes of what happened into a document referred to as a Rapid Resolution form. (Tr. 356; Respondent's Exhibit 9). She did so in an effort to memorialize the content and context of the wholly inappropriate behavior by Ms. Amaral.

On Monday, March 16, 2015, Ms. Lowther called Nate Reid, the Union's Chief Steward at the time, and described the altercation with Amaral. (Tr. 356; Respondent's Exhibit 9). Ms. Lowther asked if the Union would meet with her and Ms. Amaral to try to work out an informal resolution. (*Id.*) The Union Chief

Steward responded "that he didn't want to deal with her [Ms. Amaral]." (Tr. 357). Mr. Reid told Ms. Lowther: "he didn't need her [Amaral] yelling at him." (Respondent's Exhibit 9). Ms. Lowther asked if another Union official, Tim Hart, could be helpful and "He [Reid] said I am sure that Tim Hart doesn't want her yelling at him either." (*Id.*) Ms. Lowther told the Chief Steward that she would give him until the next day to get in touch with her and if he didn't contact her that she would need to contact HR because the incident with Ms. Amaral "was unprofessional and her yelling at me in a hallway could be detrimental to my program as the Employee Concerns Program Coordinator because other people could hear it." (Tr. 357). When the Union Chief Steward did not get back to Ms. Lowther, she brought the situation to the attention of Brenda Gailes, the Respondent's Human Resources Manager. (Tr. 360). Ms. Gailes advised Ms. Lowther to either file with the Ethics Line or to talk to security management and explain what happened. *(Id.)* Accordingly, Ms. Amaral did meet with two Security Managers, Rich Daly and Phil Beabout, and explained what happened. (Tr. 361). The Security Managers informed Ms. Lowther that they were going to notify the Ethics Department or Internal Investigations. (Tr. 362). At that point Ms. Lowther closed out the matter from her perspective as it had been referred out for handling. (Tr. 363).

Subsequently, the matter was investigated by one of the Respondent's lead investigators, Gillian Taylor. (Tr. 373). Ms. Taylor was informed by the Security Manager Richard Daly that he was going to put in an ethics concern regarding an

interaction between two individuals. (Tr. 380). Upon receipt of the Case Detail Report, Ms. Taylor commenced her investigation. (Tr. 381; Respondent's Exhibit 11). In the course of her investigation, Ms. Taylor interviewed Ms. Lowther, the Facilities Superintendent Bill Mock, and Ms. Amaral. (Tr. 385; 387–88). When Ms. Taylor was interviewing Ms. Amaral and throughout the course of the investigation, Taylor was not aware that Ms. Amaral was a Union Steward. (Tr. 390). Ms. Taylor's investigation concluded that "the concern that Ms. Amaral acted in an unprofessional manner was substantiated. And that was based on Ms. Amaral's admission of having cursed at and screamed at Ms. Lowther in the hallway during their interaction." (Tr. 391).

Ms. Gailes, the Employer's Human Resources Manager, was informed of the proposed verbal warning discipline with respect to Ms. Amaral. Ms. Gailes indicated her agreement with the discipline. (Tr. 440). At the time that Ms. Gailes reviewed the proposed discipline and indicated her agreement, she was not aware that Ms. Amaral was a Union Steward. (Tr. 441).

Mr. Noyes learned of Ms. Amaral's concerns with the water cooler by virtue of his normal daily review of Condition Reports. (Tr. 318). Ms. Amaral initiated two Condition Reports complaining about the water cooler, the first on the morning of Friday, March, 13, 2015 (General Counsel's Exhibit 9(a)) and the second in the afternoon of Saturday, March 14, 2015 (General Counsel's Exhibit 9 (b)). Friday reports are generated for Mr. Noyes' review over the weekend, so he actually reviewed the Amaral Condition Reports on Monday, March 16, 2015. (Tr. 319–20).

Mr. Noyes made an assessment that there was a level of frustration in Amaral's Condition Reports: "In review of the condition reports, the … suggested action description all being in caps indicated to me that there was … some level of frustration that accompanied these condition reports. So I made a note that I needed to seek out Ms. Amaral to attempt to determine what the situation or what the circumstances were surrounding this, and to see if there was some way of being able to assist with resolution." (Tr. 320).

Mr. Noyes sought out Ms. Amaral and discussed the water cooler with her. (Tr. 322). After this discussion with Ms. Amaral, Mr. Noyes sought out the Facilities Superintendent and was informed that the water cooler was removed due to concerns for the quality of the water and the degradation of the filters. (Tr. 323). Mr. Noyes expressed to the Facilities Superintendent "that he had five days to either resolve the issue by replacing the water bubbler or by providing a continuous water supply to the officers in the primary." (*Id.*) Mr. Noyes then followed-up with Ms. Amaral and discussed the steps he had taken. Ms. Amaral thanked him. (Tr. 323–24). At the time that Mr. Noyes took these actions, he was not aware of the altercation that Ms. Amaral had with Ms. Lowther on May 13, and he was not aware that Ms. Amaral was a Union Steward. (Tr. 324).

4. Policies Challenged in Complaint

Entergy maintains a set of guidelines which is known as the "Code of Entegrity." In addition to the Code of Entegrity, the Respondent maintains various policies. The Second Amended Consolidated Complaint alleges that various provisions of the Code of Entegrity are overbroad. (General Counsel's Exhibit 1(w) at ¶8). In

addition, the Complaint alleges that the following policies are illegal: Discrimination and Harassment Prevention Policy; Employee Use of Internal or External Social Media Sites; Protection of Information Policy; Government Investigations Policy; and Issue Resolution Policy. (*Id*. at ¶¶ 9–13).

The Complaint alleges that the Respondent disciplined Amaral on the basis of the Discrimination and Harassment Prevention Policy and the Code of Entegrity (*Id*. at¶15(b)). The Complaint also alleges that by maintaining the other above referenced policies—which are unrelated to the Amaral discipline—the Employer has been interfering with, restraining and coercing employees in the exercise of their Section 7 rights in violation of Section 8(a)(1). (*Id*. at ¶17).

5. Bargaining History on Issue of Respect

Brenda Gailes is Pilgrim Station's Human Resources Manager. In that capacity, she handles Union grievances and arbitrations, and is part of the management negotiating team for union contracts. (Tr. 429). Specifically, Ms. Gailes has been on the negotiating team for all bargaining between the Employer and the Union, which dates back to 2007. (Tr. 431). Article I of the Collective Bargaining Agreement, in effect for the period October 1, 2013 through October 1, 2017, is captioned, "Statement of Mutual Goals." (Respondent's Exhibit 14). It states, in part, that "We agree that the formula for future success is based on consultations, mutual respect, open communication, shared success and innovative problem…." (*Id*.) Ms. Gailes testified that the Union never proposed modifying that language in Article I. (Tr. 432).

Ms. Gailes testified that the Union has never filed any grievances challenging the Employer's authority to maintain the Code of Entegrity, and has never made any proposals to modify or change the Code of Entegrity. (Tr. 436). With respect to all of the policies at issue in this case, namely — (i) the Discrimination and Harassment Prevention Policy; (ii) the Employee Use of Social Media Policy; (iii) the Protection of Information Policy; (iv) the Government Investigations Policy; and (v) the Issue Resolution Policy — Ms. Gailes testified that she was not aware of any grievances filed by the Union challenging the Respondent's authority to maintain any of those policies. (Tr. 437). She also testified that she was not aware of any proposals made by the Union to either amend or eliminate those policies. (*Id.*) With respect to the Issue Resolution Policy, Ms. Gailes testified that that policy does not apply to bargaining unit employees. (*Id.*) The Union conceded that it made no proposals to modify any of the policies in the Complaint, including removing language referencing "respect" in the workplace. (Tr. 250–52).

IV. Argument

1. Entergy's Workplace Policies Do Not Violate the Act

As a licensed operator of a nuclear power station subject to stringent regulation by the NRC, Entergy is bound by law to provide its employees with a respectful workplace. In the Code of Entegrity and policies at issue in this case, Entergy explicitly affirms employees' Section 7 rights in **five** separate places, leaving no doubt that neither the Code nor the policies do any damage to rights under the Act. (General Counsel's Exhibit 15(a)–(f)). Moreover, the Code and the policies contain

clear statements of their goals and objectives, providing the limiting language the Board has held to be effective at bringing clarity to any allegedly ambiguous language. The language of the policies themselves—even without their clear recognition of Section 7 rights and appropriate limiting language—fully complies with the *Lutheran Heritage Village-Livonia* standard.

And tellingly, the Union never once raised any challenge to the policies at issue in this case, even ignoring an opportunity to do so in a recent arbitration involving the same policies at issue here. (Respondent's Exhibit 17). The views of the Union are powerful evidence that any reasonable employee would understand the rules as having no impact on Section 7 rights.

a. The Policies Must Be Read In Context, Taking Into Account The NRC Regulatory Framework

Entergy's policies must be read in context, taking into account all of the policies and the Code of Entegrity, as well as the NRC regulatory backdrop. The Board "must refrain from reading particular phrases in isolation." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). And, the Board "must not presume improper interference with employee rights." *Id.* (citing *Lafayette Park Hotel*, 326 NLRB 824 (1998).

Evaluating the legality of workplace conduct rules involves "working out an adjustment between the undisputed right of self-organization" and "the equally undisputed right of employers to maintain discipline in their establishments… .Opportunity to organize and proper discipline are both essential elements in a balanced society." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203

F.3d 52 (D.C. Cir. 1999) (citing *Republic Aviation v. NLRB*, 324 U.S. 793, 797–98 (1945)). Such rules are only unlawful where they would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Id.*

In *Lutheran Heritage*, the Board held that rules prohibiting abusive and profane language, harassment, and verbal, mental and physical abuse were lawful because they were "intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity." 343 NLRB at 647. Relying on *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), the Board held that "employers have a legitimate right to establish a civil and decent work place" and that "employers have a legitimate right to adopt prophylactic rules banning [profane and abusive language] because employers are subject to civil liability under federal and state law should they fail to maintain a workplace free of racial, sexual, and other harassment and abusive language can constitute verbal harassment triggering liability under state or federal law." 343 NLRB at 647.

Here, Entergy is not only subject to those same federal and state laws requiring a workplace free of harassment, it is subject to an *additional* regulatory scheme imposed by the Nuclear Regulatory Commission. The NRC's directive that Entergy (and other nuclear licensees) maintain a workplace where "trust and respect permeate the organization" is the backdrop against which the policies at issue in this case must be judged. (Respondent's Exhibit 3, 4, 5, 6, and 7). In analogous circumstances, the Board takes into account the applicable requirements imposed

by other regulatory bodies. *See Dresser-Rand Co.*, 358 NLRB 254 (2012) (reading policies in context of SEC regulatory environment); *see also* GC Memorandum 15-04 (finding confidentiality rule lawful after evaluating it in context of "rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws.").

b. Entergy's Policies Do Not Violate the Act

Under Board law, an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading, refraining from reading particular phrases in isolation. *Id.* at 825. And, it must not presume improper interference with employee rights. *Id.* Consistent with these principles, the Board's inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. Such rules, of course, violate the Act.

Where, as here, the challenged rule does not explicitly restrict Section 7 activity, the General Counsel must establish that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. General Counsel cannot meet that burden.

c. Entergy's Code of Entegrity and Underlying Polices Unambiguously Affirm Employees' Section 7 Rights

In **five** prominently featured sections of the Code and policies at issue in this case, Entergy expressly affirms the rights afforded under Section 7, and makes plain to any reasonable employee that nothing in the Code or the policies restricts those rights.

First, the Code itself contains the following language:

> The Code and this section are not intended to, and shall not restrict an employee's rights under any federal, state or local labor or employment law, or regulation, to discuss his or her salary, wages, hours, or other terms and conditions of employment with nonemployees or with other employees.

(General Counsel's Exhibit 15(a) at 000026). Then, in italicized print, highlighted in a box drawing attention to this important language, the Code explicitly references rights under the Act:

> ***Unrestricted Rights***
>
> *Nothing in this Code is intended to restrict an employee's rights under any federal, state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement.* ***These employee rights include, but are not limited to the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others***. (emphasis added).

(General Counsel's Exhibit 15(a) at 000026). The policies themselves contain similar language affirming Section 7 rights. For example, echoing the Code's respect for Section 7 rights, the Protection of Information Policy states:

> **5.6.3** Nothing in this Policy is intended to restrict an employee's rights under any federal, state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement. **These employee rights include, but are not limited to the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others**. (emphasis added).

(General Counsel's Exhibit 15(d) at 000011). And, the Social Media policy makes it crystal clear that employees' rights to engage in Section 7 activity are fully protected:

> 5.2 **Unrestricted Rights**. Nothing in this Policy is intended to interfere with or restrict any rights provided by law, including those affording under the National Labor Relations Act. Nothing in this policy will be construed to limit your right to speak with others regarding your wages and other terms and conditions of employment.

(General Counsel's Exhibit 15(c) at 000004). The policy goes on to list Entergy policies that must be followed when engaging in social media, including its policies regarding:

- Harassment and discrimination
- Intellectual property
- Use of communications systems
- Confidentiality

(*Id.*) Critically and fatal to the General Counsel's case, the policy states in no uncertain terms that "Entergy's **policies** shall not be construed to limit your right to speak with others regarding your wages and other terms and conditions of your employment." (emphasis added) (*Id.*). The "policies" referenced in this statement include the very same policies alleged to be unlawfully overbroad. Similarly, the

language appearing in the Code plainly states that "Nothing in **this Code** is intended to restrict an employee's rights…to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with other." (emphasis added). (General Counsel's Exhibit 15(a) at 000026).

Thus, in **five** separate places, Entergy affirms the rights of its employees to engage in Section 7 activity, explicitly referencing "protected concerted activity" **twice** and explicitly referencing rights under the Act by name. The General Counsel conjures a hypothetical employee who would read this language and somehow interpret language *affirming* rights as language *limiting* rights. Your Honor previously rejected such a restrictive reading of employer policies in *The Scherzinger Corporation*, No. 09-CA-165460, 2016 NLRB LEXIS 450 (N.L.R.B. Div. of Judges June 17, 2016). In that case, the General Counsel alleged that the employer's complaint procedures—which stated the employer's expectation that employees would bring complaints to management—would be understood by employees as restricting their rights to bring charges to the Board. *Id.* at *17. Your Honor rejected this argument, pointing to language in the policy stating that "Nothing in this Agreement shall be interpreted to mean that Employee is precluded from filing complaints with . . . the National Labor Relations Board." *Id.* at *19. The General Counsel tried to argue around this clear statement of employee rights, calling the language "buried" and asserting that employees would not

understand that the language applied only to an arbitration clause and not the entire agreement. *Id.* at *20. Again, Your Honor correctly rejected this myopic reading of a clear policy. In *Scherzinger Corporation*, the General Counsel also argued that the employer violated the Act because its policy ""does not explicitly make clear that it is not intended to prevent employees from speaking to each other' about work-related issues." *Id.* at *17. The only logical interpretation of that argument is that a policy containing such language would be lawful. That is exactly what Entergy's policies say, nearly verbatim. The Complaint should be dismissed.

d. Entergy Lawfully Maintained Its Code of Entegrity and Harassment And Discrimination Policy

The language of the policies themselves also meets the test established by the Board in *Lutheran Heritage Village-Livonia*. The two central rules at issue in the case are those cited in Ms. Amaral's discipline: the Code of Entegrity and the Harassment and Discrimination Policy. (General Counsel's Exhibit 15(a) and 15(b)). Under the applicable standards discussed above, both are lawful on their face and as applied to Ms. Amaral.

The Code of Entegrity states as follows:

> **3. Be a courteous driver:** *Respect the workplace*. Just as drivers have a responsibility to care for their passengers, Entergy employees have a responsibility to be civil and respectful to co-workers during workplace interactions.

(General Counsel's Exhibit 15(a) at 000005). Critically, the Code speaks to interactions between "co-workers" and does not in any way govern interactions between employees and management on its face. The Code goes on to place these requirements in the appropriate context as follows:

A. DISCRIMINATION AND HARASSMENT

> Entergy seeks to maintain a work environment that respects the dignity and worth of each individual and is free from harassment and discrimination based on any protected characteristics or protected activities. Protected characteristics include race, color, sex, religion, pregnancy condition, national origin, age (40 and over), sexual orientation, gender identity and/or expression, veteran's status, marital status, qualified disability, genetic information (which includes family medical history) or any characteristic protected by law. Protected activities include, for example, filing a claim with the Equal Employment Opportunity Commission or another governmental entity.
>
> Examples of prohibited conduct when based on a protected characteristic or a protected activity include, but are not limited to, the following:
>
> - Denying equal employment opportunities.
> - Making, transmitting, intentionally accessing, displaying or circulating offensive or derogatory statements, comments, jokes, slurs, gestures, pictures, e-mails or links.
> - Creating an offensive, hostile or intimidating working environment.
> - Engaging in unwelcome flirtation, sexual advances, requests for sexual favors, propositions, touching and other verbal or physical conduct of a sexual nature.
>
> Entergy's policy is intended to extend further than the law in order to maintain a work environment that is inclusive and respects the dignity and worth of each individual. It prohibits abusive conduct that Entergy determines is inappropriate, which can include intimidation, coercion or bullying, regardless of whether such conduct is unlawful or based on a protected characteristic or protected activity. Please refer to the Discrimination and Harassment Prevention Policy for details.

(General Counsel's Exhibit 15(a) at 000014). The Discrimination and Harassment Policy itself expands on these ideas, and further contextualizes the rule, making it clear that it does not apply to Section 7 activities. (General Counsel's Exhibit 15(b)).

The policy sets forth the following examples of prohibited conduct, further evidencing its intent:

> 5.4.1 Denying equal employment opportunities:
>
> 5.4.2 Making offensive or derogatory statements, comments, jokes, slurs, or gestures;
>
> 5.4.3 Transmitting, intentionally accessing; displaying or circulating derogatory jokes, objects, pictures, drawings, statements; e-mails or links;
>
> 54.4 Engaging in any other verbal or non-verbal behavior of a derogatory nature;
>
> 5.4.5 Interfering with work performance or creating an offensive, hostile, or intimidating working environment;
>
> 5.4.6 Engaging in unwelcome flirtation, sexual advances, requests for sexual favors, propositions, touching and other verbal or physical conduct of a sexual nature;
>
> 5.4.7 Threatening insinuating that an individual should submit to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature when:
>
> - submission to such conduct explicitly or implicitly is a term or condition of an individual's employment;
> - submission to or rejection of such conduct by an individual is used as the. basis for employment decisions affecting such individual; or
> - such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment; and
>
> 5.4.8 Engaging in any other act or series of actions that single out a person or a group/class of people to his/her/their objection or detriment

(*Id.* at 000005). The General Counsel alleges that Entergy's employees would reasonably construe its policies as restricting Section 7 activity, apparently zeroing in on the use of the word "respect." This argument must be rejected for five reasons.

First, as discussed above, the policies unambiguously affirm Section 7 rights and cannot be read by any reasonable employee as restricting those same rights.

Second, the word "respect" is not prohibited under the Act. *See* GC Memorandum 15–04 ("Similarly, rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights."); *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014) (work rule prohibiting "lack of respect" did not violate the Act). The Board has repeatedly held that policies or rules addressing conduct that is reasonably associated with actions that fall outside the Act's protections, such as conduct that is malicious, abusive or unlawful, are permissible. *See*, *e.g*, *Lutheran Heritage Village-Livonia*, *supra*, 343 NLRB at 647–49 (rule addressing "verbal abuse," "abusive or profane language," and "harassment"); *Palms Hotel & Casino*, 344 NLRB 1363, 1367–68 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).

Third, read in context, it is clear that the type of "disrespectful" conduct prohibited by the policies is conduct that amounts to harassment, discrimination, threatening, or intimidating behavior. At trial, the General Counsel elicited testimony purporting to show that Entergy's employees use profanity and are not disciplined for doing so. General Counsel misses the mark entirely—Ms. Amaral was not disciplined for garden-variety swearing or shop talk, but rather for offensive and harassing behavior. Indeed, the evidence shows that the Respondent

does not discipline employees who use profanity in the course of arguably protected concerted activity, where harassment or intimidation is not present.

The General Counsel's witness, former Chief Steward Timothy Hart, testified about an interaction with former security superintendent Richard Daly regarding the use of vacation time when employees arrive late for their shifts. (Tr. 255–58). Mr. Hart testified regarding his conversation with Mr. Daly about an employee who was late and forced to use vacation time, as follows:

> **Q** [BY MR. HLAWATI]: And you told him [Mr. Daly] that you're fucking him, right?
>
> **A** [BY MR. HART]: He was screwing him and I was fucking disappointed, I believe it was…he was screwing everyone else over. And I told him – I would tell my membership to just call in sick rather than come in late.

(Tr. 256). Mr. Hart not only used profanity, he told his superior that he would recommend that bargaining unit members inappropriately and falsely claim to be sick so as to avoid discipline. (Tr. 257). Mr. Hart received *no discipline* whatsoever for this behavior.[2] (Tr. 258).

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[2] Much effort was made by the General Counsel to describe a profanity-laced environment at PNPS. Even if it were true (which is hard to believe in a workplace that is roved by NRC resident inspectors), the "shop talk" appears to have been largely ignored *to the benefit of the Union* and with respect of any instance of arguable Section 7 activity. By contrast, Ms. Amaral, was not disciplined for her profanity alone. (Tr. 422–23). The "shop talk" described by witnesses for the General Counsel was already argued and discredited by an arbitrator addressing the same issue between Entergy and the Union. *See* Respondent's Exhibit 17 (arbitrator affirming suspension for profanity where grievant "in an agitated state in a louder tone of voice" engaged in a "personal attack on his supervisor, and one made in front of other workers in a very public fashion. This kind of activity is just not accepted in the American workplace. It is a far thing indeed from profanity laden shoptalk that is an attack on no one.").

The record establishes that employees engage in union activity without discipline, demonstrating Entergy's respect for its employees' Section 7 rights.

Fourth, the Code and the policy contain clear statements of purpose, leaving no doubt that they do not abridge Section 7 rights. The Discrimination and Harassment policy states:

> **1.0 PURPOSE AND APPLICABILITY**
>
> The purpose of this Policy is to ensure compliance with all applicable federal, state and local laws relating to employment discrimination, harassment and retaliation. It also is designed to maintain a work environment that respects the dignity and worth of each individual and that permits workers to be free from intimidation, coercion, bullying and other types of disrespectful or abusive conduct. This Policy sets forth a mandatory reporting procedure and strictly prohibits retaliation.

(General Counsel's Exhibit 15(b) at 000002). The Code states:

> Two of Entergy's core values are Treat People with Respect and Above All, Act with Integrity. By following the Roadmap to Integrity, we can help maintain those values. The Roadmap to Integrity is an overview of ethical guidelines found in this Code. For a quick reminder of the Code's key components, keep this roadmap handy.

(General Counsel's Exhibit 15(a) at 000004).

The above language, as well as other statements of intent in the Code and the Discrimination and Harassment Prevention policy, remove any doubts as to the scope of the Code and the policy, and reinforces that Section 7 is beyond their orbit. In *Copper River of Boiling Springs, LLC*, the Board found similar "limiting language" sufficient to "prevent[] employees from concluding that an unclear rule restricted the exercise of their Section 7 rights." 360 NLRB No. 60 at *23; *see also* GC Memorandum 12-59 ("[r]ules that clarify and restrict their scope by including

examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected concerted activity, are not unlawful.)

Fifth, Entergy's robust reporting procedures discussed in Section II.2 above show that the Respondent *encoura*ges employees to bring concerns forward and does not chill protected concerted activity. *See William Beaumont Hospital,* 363 NLRB No. 162 (2016) (finding that employees were lawfully disciplined for insubordination and not for bringing concerns to management where the employer encouraged employees to do so); *see also Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 214 (D.C. Cir. 1996) (Board's conclusion that rules chilled Section 7 overturned where employer "affirmatively encouraged discussions among employees that did not include physicians or management").

Entergy goes far beyond the Act's prescription that employees be free to raise issues concerning their terms and conditions of employment, and actively encourages its employees to do so. Policies that violate Section 8(a)(1) often have a chilling effect. Here, no such thing occurred. To the contrary, the record is replete with evidence that employees—including Ms. Amaral—regularly exercise their rights to discuss their terms and conditions of employment, with fellow bargaining unit members and with management.

The General Counsel imagines a hypothetical employee who ignores myriad reminders about the importance of bringing workplace concerns forward; who walks past the signs and posters reminding of the Respondent's Employee Concerns Program Coordinator, an individual dedicated to addressing workplace concerns

and complaints; and is somehow unaware of the Condition Reporting process, which garners thousands of reports per year. While such a fiction might exist in the mind of the General Counsel, such an employee cannot be called "reasonable" under *Lutheran Heritage*.

Read together and in context—as they must be under Board law—Entergy's policies aim to accomplish a simple but critical objective: ensuring that all employees enjoy a workplace free of harassment and intimidation, and feel comfortable utilizing one or more of Entergy's numerous reporting avenues. As the record evidence established, Entergy does not operate a typical workplace, and must comply not only with the panoply of workplace laws (including the Act), but also fulfill the NRC's mandate to provide a workplace where "trust and respect permeate the organization." Although the interplay between the NRC requirements and the Act does not appear to have been addressed by the Board in a published decision, in a closely-analogous situation, the Board affirmed an ALJ's analysis of employer rules against the backdrop of the SEC regulatory environment. In *Dresser-Rand Co.*, 358 NLRB 254 (2012)[3], the General Counsel alleged that the employer's insider trader and fair disclosure policies violated the Act because they restricted employees' rights to communicate with third parties. The ALJ correctly observed that "the policies have very significant implications relating to the Federal securities laws and regulations." *Id.* at 280–81. Following the Supreme Court's warning to the Board "to refrain 'from effectuat[ing] the policies of the Labor

[3] *Dresser-Rand* was issued during the *Noel Canning* era, but remains persuasive authority.

Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.'" *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), the ALJ concluded that the policies did not unlawfully restrict Section 7 rights, either on their face or in their application. *Id.* at 283.

Even more compelling circumstances are present here. In *Dresser-Rand*, the ALJ and Board were concerned with potential violations of securities laws, and the adverse effect on the securities marketplace. *Id.* at 282. Here, the safety and security of not only Entergy's employees, but the public as well are implicated by the issues in this case. The prevention of nuclear accidents is simply not subordinate to the Act, where the Act's prescriptions already have been harmonized in Entergy's policies.

The General Counsel's view of the policies at issue in this case is myopic and ignores the realities of the highly-regulated, safety-critical environment at Pilgrim. The policies are exactly the "commonsense behavioral guideline for employees" that the Board deemed to be lawful in *Lutheran Heritage*.

2. The Remaining Policies Alleged In the Complaint Were Lawfully Maintained

In scattershot fashion, with no unifying or even discernable theory, the Complaint cites various pieces of Entergy's Employee Use of Internal or External Social Media Sites policy (Compl. ¶ 10); its Protection of Information Policy (Compl. ¶ 11); its Government Investigations Policy (Compl. ¶ 12); and its Issue Resolution Policy (Compl. ¶ 13).

None of these policies violate the Act as set forth below.

First, as discussed above, the policies contain clear language affirming Section 7 rights. (General Counsel's Exhibit 15(c)–(f)).

Second, the policies contain limiting language, clearly stating their purposes and objectives tied to legitimate business concerns. *Id*.

Finally—and underscoring the haphazard and inconsistent theories of the Complaint—the Complaint alleges that the Issue Resolution policy violates the Act. But that policy *on its face* has no application to bargaining unit employees: "This Policy provides all regular full-time **Non-Bargaining Employees**…" (General Counsel's Exhibit 15(f) at 000002) (emphasis added). And, a witness called by the General Counsel, Mr. Hart, testified that the policy did not apply to union employees. (Tr. 248–49).

The inclusion of the issue Resolution Policy shows how completely disconnected the Complaint is from the realities of Entergy's workplace and the bargaining unit. Because none of the cited policies violate the Act, the Complaint must be dismissed.

3. The Charging Party's Discipline Did Not Violate The Act

Jamie Amaral was disciplined for violating Entergy's Code of Entegrity and its Harassment and Discrimination Prevention policy. Because those polices were lawfully maintained, her discipline for violating them also was lawful. The General Counsel argues in the alternative that the Charging Party was disciplined because she engaged in protected activity, or because of her status as a union steward. Neither alternative theory passes muster.

a. Jamie Amaral's Discipline Was Lawful

Where there is a dispute as to what motivated the employer's allegedly unlawful action, the familiar *Wright Line* analysis applies. *Wright Line*, 251 NLRB 1083 (1980). Under the *Wright Line* test, the General Counsel must first demonstrate that "the employee's protected conduct was a substantial or motivating factor in the adverse action." *NLRB v. Transp. Mgt.*, 462 U.S. 393, 401 (1983); *accord Holsum de P.R., Inc. v. NLRB*, 456 F.3d 265, 269 (1st Cir. 2006). The General Counsel must show that: (i) the employee engaged in the protected activity; (ii) the employer had knowledge of that activity; (iii) the employer harbored animus toward it; and (iv) a causal link between the animus and the adverse employment action. *Transp. Mgt.*, 462 U.S. at 401–03. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility Contractors*, 353 NLRB 166, 166–67 (2008); *Intermet Stevensville*, 350 NLRB 1270, 1274–75 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000). The General Counsel must then show that the employer's reason is pretextual. *Holsum*, 456 F.3d at 269. The General Counsel can demonstrate this with evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly disciplined, or disparate treatment of the disciplined employee. *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (2012).

B. The General Counsel Cannot Establish a *Prima Facie* Case Under *Wright Line*

As a threshold matter, the General Counsel cannot establish that Ms. Amaral engaged in protected concerted activity. Tellingly, the first two Condition Reports that she submitted concerning the water cooler made no reference whatsoever to safety concerns. (General Counsel's Exhibit 9(a)–(b)). Only *after* her altercation with Ms. Lowther did she submit a Condition Report that mentioned possible safety concerns, which strongly suggests that Ms. Amaral's concerns were of a personal nature and therefore not concerted. (General Counsel's Exhibit 9(c)). Ms. Lowther testified that, when Ms. Amaral engaged in her tirade, she did not claim to be speaking on behalf of anyone other than herself. (Tr. 350–51).

Even assuming, *arguendo*, that Ms. Amaral engaged in protected activity when she confronted Ms. Lowther about the water cooler, the General Counsel cannot prove any of the remaining elements of the *prima facie* case under *Wright Line*.

First, at the time she reported the incident, Ms. Lowther was unaware that Ms. Amaral was a union steward. (Tr. 350). Similarly, Ms. Taylor had no knowledge of Ms. Amaral's status as a steward when she conducted her investigation. (Tr. 389). Moreover, Ms. Lowther attempted to remediate the issue without resort to a formal complaint by contacting the Union and asking for the situation to be addressed informally. (Tr. 356–57; Respondent's Exhibit 9). Only after being shut down by the Union did she file a formal complaint. (Tr. 360). The General Counsel's theory that Ms. Amaral was "targeted" because of her union status by two individuals who did not even know she was a steward makes no sense, particularly given the lengths to

which Ms. Lowther went in her efforts to avoid making a formal complaint. (Tr. 357–58).

Second, the record evidence demonstrates no animus by the Respondent toward the union or bargaining unit employees. To the contrary, Ms. Amaral's CRs about the same issue were addressed. (Tr. 319–20; 323).

Finally, the General Counsel cannot establish a link between any allegedly protected conduct and Ms. Amaral's discipline. The record evidence demonstrates that she was disciplined for inappropriate behavior, not for raising a workplace concern.

c. Entergy's Reason for Disciplining Ms. Amaral Was Not Pretextual

Under *Wright Line*, a motive is pretextual where "examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon." 251 NLRB at 1084. Under this analysis, and in consideration of the credible testimony of the Respondent's witnesses, the General Counsel cannot show that Entergy's stated reasons for disciplining the charging party were pretextual.

To the contrary, the record evidence establishes that employees who engage in union activity are not disciplined, even if they happen to use profanity in doing so. (Tr. 255–58). The record also establishes that other employees have received more severe discipline than Ms. Amaral for violating the very same policies at issue in this case. (Tr. 443–44; Respondent's Exhibit 17).

4. For As Long As The Union And Entergy Have Had A Bargaining Relationship, The Union Waived Any Objection To The Respondent's System Policies And Never Sought To Negotiate Or Grieve How The Policies Were Applied To Union Employees

The Union waived any argument that the challenged policies are unlawful. Further, at no time did the Union file a grievance challenging the application of the policies or the policies themselves, even where Union employees were disciplined pursuant to what the General Counsel now contends are unlawful rules. This establishes not only waiver, but shows that the Union understood the policies as not restricting Section 7 rights.

The Union and Entergy began a bargaining relationship in 2007, at which time Entergy agreed to recognize the Union as the bargaining representative of the security officers at PNPS. (Tr. 430–31). Since that time, the parties negotiated a first contract and two (2) successor collective bargaining agreements that included references to the Entergy system policies that are challenged here. (Tr. 219; 250–52).

All iterations of the parties' CBAs including the current CBA included references to the authority to promulgate Entergy system policies (Tr. 250–55; Respondent's Exhibit 14). In particular, the Management Rights clause states unequivocally that:

> The Company retains, exclusively and without limitation, all of the rights and functions of the Management, … includ[ing], among others, the right to: establish or continue polices, practices and procedures for the conduct of business and from the time to time change or abolish such policies, practices and procedures.

(Respondent's Exhibit 14, at p. 10). The system policies referenced by the CBA include all the policies alleged to be unlawful in the Complaint, including the Code

of Entegrity, Discrimination and Harassment Prevention Policy, Employee Use of Internal and External Social Media, Protection of Information Policy, and Government Investigations. These polices long predate the underlying charges and Complaint in this matter. Yet the Union did not seek to bargain *any* of the policies at issue in the case for almost the last decade. (Tr. 432–33).

Witnesses for both Respondent and the General Counsel confirmed that the Union never tendered a proposal or counter-proposal on the allegedly unlawful Entergy system policies that applied to the bargaining unit. The PNPS Human Resources Manager, Brenda Gailes, who has been involved in the bargaining of every Union contract at PNPS, testified that the Union never sought to negotiate the policies and never filed a grievance challenging their existence or application. (Tr. 436–37). Specifically, Ms. Gailes testified:

> **Q** [BY MR. MCCOURT]: Ms. Gailes, are you familiar with the Code of Entegrity?
>
> **A** [BY MS. GAILES]: Yes I am.
>
> **Q** Based on your experience in dealing with Local 25 since 2007, are you aware of whether the Union has filed any grievances challenging the company's authority to maintain the Code of Entegrity?
>
> **A** Not that I'm aware.
>
> **Q** I'm going to ask this next question to try and save time if I get an objection I'll do it slow way. I'm going to ask you the same question with respect to five different policies.
>
> **A** Okay.
>
> **Q** So let me first, with Your Honor's permission, identify the policies and then I would like to ask her the same question with respect to each. And the policies are the "Entergy Discrimination and Harassment

Policy," The Employee Use of Social Media Policy," the "Protection of Information Policy, and the "Government Investigations Policy."

A Okay.

Q Are you familiar with those four Entergy policies?

A Yes.

Q Are you aware of any grievances filed by Local 25 challenging the company's authority to maintain any of those four policies?

A No, I am not.

Q Are you aware of any proposals made by the Union at the bargaining table seeking to either amend or eliminate those four policies?

A No, I am not.

(Tr. 435–37). More than just the Respondent's witness confirmed that the Union bargained and accepted the Entergy system policies, but the Union's former Chief Steward and bargaining committee member *agreed*. Tim Hart testified that he served on two separate bargaining committees for the renegotiation of the Local 25 CBA in 2010 and 2013 (Tr. 219). On cross-examination, Mr. Hart confirmed that there were no proposals to amend the contract to delete or modify allegedly unlawful system policies in the most recent contract negotiation:

Q [BY MR. HLAWATI]: You indicated earlier that you were familiar with, at least a basic familiarity with some -- all of these policies, right?

A [BY MR. HART]: That's correct.

***

Q [BY MR. HLAWATI]: Do you recall that the Code of Entegrity was in existence when you bargained your Local 25 contract?

A [BY MR. HART]: I can't really recall what was around then. I'm sure there was some type of policy, but I don't know for certain.

Q Okay. Let's not go so far back then as to 2010. What about during the 2015 –

A 2013.

Q 2013 collective bargaining on the Local 25 contract, were you aware there was a Code of Entegrity policy?

A I would have, yeah.

Q To keep things neater, were you aware that the other policies existed, beyond the Code of Entegrity, in 2013 during the bargaining sessions?

A You're talking discrimination.

Q Discrimination and harassment.

A Yeah, I was aware they were.

Q Okay. During the bargaining sessions, did you – did Local 25 make any proposals in 2013 bargaining sessions to modify any of these policies?

A Not that I recall.

(Tr. 250–52). Hart further confirmed that the policies[4] applied to all Union employees and that there have been no grievances filed to challenge the policies as they were adopted, changed or applied over the course of the CBA terms:

Q [BY MR. HLAWATI]: Did the union, in your time, ever file, to the best of your recollection; ever file any grievances relating to any of these policies, Mr. Hart?

A [BY MR. HART]: No, I -- I don't think I've ever filed a grievance in relation to a policy.

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[4] All the policies at issue in the case apply to Union employees, except for the Issue Resolution Policy, which states on its face that it does not apply to bargaining unit employees.

Q Okay.

A Actually, I know I have never.

Q Do the -- do the policies apply to local bargaining -- Local 25 bargaining unit employees?

A Sure. That. And as well as the CBA –

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Q [BY MR. HLAWATI]: Has Entergy changed any of its system policies while you were a Local 25 bargaining unit employee?

A [BY MR. HART]: I'm sure they've changed the policies. I wouldn't be able to tell you which ones.

(Tr. 254–55). The testimony of both Gailes and Hart is substantiated by the Union's non-response to the Respondent's subpoena *duces tecum*, wherein Entergy requested the collective bargaining history related to the contract negotiations between the parties since 2010:

> 19. For the period January 1, 2010 through to the return date of this subpoena, all notes generated by the UGSOA during negotiations with the Respondent for a collective-bargaining agreement.
>
> 20. For the period January 1, 2010 through to the return date of this subpoena, all proposals and counterproposals presented by the UGSOA to the Respondent.

(Respondent's Exhibit 1). The Union provided no documents in response to these subpoena requests, confirming in the record that there were no responsive documents. (Tr. 12–14; Respondent's Exhibit 1;). By so doing, the Union concedes that the policies that apply to Union employees through each contract cycle were never challenged by the Union.

Beyond failing to negotiate any change to the system policies that are part of this case, to the extent that the Union ever contended that the policies were unlawful,[5] the Union would have been in violation of the CBA, which required that unlawful policies be conformed to the law. The CBA expressly provided that the CBA would conform to laws and regulations:

> It is understood and agreed that the provisions of this Agreement are subject to all applicable laws and regulations. If any such law or regulation conflicts with any provision of the Agreement, the parties shall confer in an effort to negotiate a lawful substitution or modification: but if, as a result of such conference, no substitution or modification is agreed upon, the unlawful provision shall be deemed not to be a part of this Agreement and shall not affect the lawfulness of the remaining provisions of this Agreement and shall not constitute a question subject to the grievance and/or arbitration procedure under Article 13 "Discipline, Suspension, Discharge or Demotion".

(Respondent's Exhibit 14, at p. 9). Here, the Union never requested a meeting with management to address any part of any system policy that was allegedly unlawful, nor did the Union file a grievance to remedy what it now (curiously) contends were overbroad policies that infringed upon its members' Section 7 rights.

Even when the Union had the recent opportunity to make the argument that the Respondent's policies were unlawful, the Union never challenged Entergy's rules. In an arbitration that was occurring during the same period as the pendency of these charges and this Complaint, the Union did not press any argument that the

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[5] Entergy maintains that the 8(a)(1) rules case that challenges the Respondent's system policies was driven by the Region, and not the Charging Party or Union. As such, the contradiction between the Union's position related to the CBA and the new allegations that the polices are unlawful can be traced to the fact that the Charging Party or Union representatives never contended that the policies were unlawful, but were merely used as a straw man for the Region's own case on the Respondent's rules. (*See infra* Section IV.5).

Respondent's policies were overbroad or unlawful, where the same subject policies were used as the basis to suspend a long-time bargaining unit employee. (Tr. 465; Respondent's Exhibit 17;). In that recent case with much more severe discipline than was administered to Amaral, a Union employee—Brandon D'Andrea—received a two-day suspension for profanity and disrespectful conduct. (Tr. 465; Respondent's Exhibit 17). At no time during the D'Andrea grievance process or during the arbitration of the case did the Union point to unlawful rules. In the D'Andrea case, the arbitrator upheld the suspension based on the Respondent's rules in a decision issued a few weeks before the hearing in this matter. (Respondent's Exhibit 17 at pp. 42–44). The Union not only waived the argument that Respondent's policies were unlawful, but when presented with an opportunity to make the argument on behalf a suspended bargaining unit member, did not raise it. (Respondent's Exhibit 17).

Waiver remains a legal defense under Board law and should be applied here. Where a subject is covered by the CBA, then an employer generally has no ongoing obligation to bargain with its employees about that subject during the life of the agreement. *See Heartland Plymouth Court MI LLC v. National Labor Relations Board*, 650 Fed. Appx. 11 (D.C. Cir. May 3, 2016); *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836–37 (D.C. Cir. 1993); *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008). "[T]he proper inquiry [to establish waiver] is simply whether the subject that is the focus of the dispute is 'covered by' the agreement." *Enloe*

Med. Ctr. v. NLRB, 433 F.3d 834, 835–38 (2005). Entergy can also establish a waiver under the "clear and unmistakable" waiver standard *Id*. at 838.

As recently as four months ago, the Board examined waiver defenses in a rules case on less than what Entergy can demonstrate here. In *Minteq Int'l, Inc.*, the Board fully analyzed the employer's trial evidence that the Union "waived its right to bargain over implementation of the Non-Compete and Confidentiality Agreement ("NCCA") under either the 'clear and unmistakable' waiver standard and the 'contract coverage' approach." 364 NLRB No. 63, at *1 7–23 (July 29, 2016). In no case did the Board indicate that the employer in *Minteq* did not have the right to assert the defense or prove it up. Unlike in *Minteq* where as soon as "the Union learned of the NCCA, it promptly filed a charge with the Board, undercutting any argument that it acquiesced in the implementation of the NCCA," the Union here sat idle for almost a decade on the policies that were in effect from the inception of the bargaining relationship. (Tr. 250–55; 435–37). On the policies that were promulgated after the bargaining relationship began, the Union also never timely challenged those in *any* forum or negotiated them out of the parties' CBA. (*Id*.; Respondent's Exhibit 17). Here, Entergy has shown not only a CBA that grants authority to the employer to promulgate the policies at issue in this case, but also a clear and unmistakable record of Union waiver on pre-existing, non-disputed elements of the Local 25 contract. The waiver is even more solidly-established where the rules were regularly relied upon to discipline Union employees where violations were shown to have occurred.

Additionally, the Union's inaction over the years shows that the Union understood that the policies do not restrict Section 7 rights. Here, the Union agreed to CBA articles that, at a minimum expressly compel "mutual respect" and an express obligation to comply with applicable law and regulation, not the least of which includes those of the NRC. The Union's recognition that an employer or labor organization can strive for a respectful workplace without impinging on Section 7 rights is perhaps best illustrated by the message that greets visitors to its website:

> UGSOA Local 25 is a labor union, committed to ensuring that our members receive fair treatment, job security, competitive wages, adequate health care coverage, dignity, and respect in the work place. Our members are dedicated to safeguarding Pilgrim Nuclear Power Station in Plymouth, MA.

(Respondent's Exhibit 15). In the nearly ten years since the Union has represented bargaining unit members employed by Entergy, it never sought to change or delete any of the policies at issue in this case. And, when discipline was issued pursuant to these same policies, the Union did not contend that the polices were overbroad. (Respondent's Exhibit 17). Had the Union been asleep at the wheel for a decade while its members were regularly pursuant to unlawful policies, its failure to protect its members' right surely would have resulted in a flood of duty of fair representation charges. The fact that did not occur points to both the Union and its members' understanding that the policies they agreed to work under were lawful.

5. The Region's Role in Transforming a Garden-Variety Discipline Charge into a Sprawling Rules Case Must Be Examined.

The NLRB cannot investigate employer polices or initiate charges on its own. *See National Assn. of Manufacturers v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013)

(citing 76 Fed.Reg. at 54,010) (Board acknowledging that enforcement of the Act "depend[s] on the existence of outside actors who are not only aware of their rights but also know where they may seek to vindicate them within appropriate timeframes"). Section 10(b) of the Act makes clear that the Board may only issue complaints and hold hearings regarding unfair labor practices"[w]henever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice" (emphasis added). *See Allied Waste Services of Massachusetts, LLC*, 01-CA-23082, -126843, 2014 WL7429200 (Dec. 31, 2014). While the Board has authority to investigate matters "related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board," it does not have "carte blanche to expand the charge as [it] might please, or to ignore it altogether." *NLRB v. Fant Milling Co.*, 360 U.S. at 309.

So, how did we get here? How did a simple, garden-variety charge challenging the lowest level of discipline alleged to have been issued because of Ms. Amaral's union steward status morph into a twice-amended and consolidated Complaint that required three days of hearing?

At trial, Entergy sought to develop a factual record and probe whether the Region exceeded the scope of its statutory authority during investigation. That request was denied, and Entergy's Request for Special Permission to Appeal remains pending with the Board. While Entergy was deprived of its right to develop the factual record, the record evidence that does exist strongly suggests that the Region—and not any charging party—may have investigated policies and initiated

charges outside the authority of the Act. Particularly in view of the fact that the Union did not contest any policies, much less all of these unrelated policies, in the D'Andrea arbitration. At minimum, Entergy must be afforded the opportunity to develop this important factual record.

While the General Counsel may contend that "the Board has authority to investigate matters related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board,"[6] there is no evidentiary record that any charging party or the Union had any communication with the Region on any policy maintained by the Respondent. (Tr. 10–14; Respondent's Exhibit 1). This conspicuous lack of a record suggests that the rules case was driven by the Region without any participation by Amaral or the Union, other than perfunctory charge amendments and new charges that appeared as the Region trawled Entergy system policies.

The chronology of this case is stark and startling. On June 6, 2015, Amaral tendered a Charge to the Region (01-CA-153956) alleging that she "received a discipline for unprofessionalism regarding language while acting in an official union capacity." (General Counsel's Exhibit 1, at (a)). A few months later, Amaral tendered an Amended Charge on September 1, 2015, alleging that she "was issued discipline for engaging in protected concerted activities while acting in her capacity as a steward. *This discipline was also issued pursuant to unlawfully overbroad rules*." (General Counsel's Exhibit 1, at (c)) (emphasis added).

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[6] *Fant Milling Co.*, 360 U.S. at 309.

When Respondent attempted to question Amaral about what rules she was referencing or her motivation for amending the Charge, counsel was denied the opportunity to examine her. (Tr. 209–14). Even without the benefit of testimony, what is clear however is that at no time did the Union or Ms. Amaral communicate with the Region regarding Respondent's rules. (Tr. 10–14; Respondent's Exhibit 1). There is not one piece of correspondence between the Union and the Region where the Union raised the issue of overboard or unlawful rules, as the Union admitted in its response to Entergy's Subpoena *duces tecum*. (*Id.*).

Further, Amaral's testimony regarding her discussions with Tim Hart—who provided Amaral with the process for filing an unfair labor practice charge with the Board—is telling. (Tr. 227–28). Hart expressly did not tell Amaral or take the position that the discipline was issued pursuant to unlawfully overbroad policies, notwithstanding the fact that the discipline notice specified the policies that the General Counsel now contends are unlawful. (Tr. 245).

Between the time Amaral filed an Amended Charge and what would soon bear out to be a Complaint that included allegations challenging **six** rules, the Union tendered a new Charge (01-CA-158947) to the Region, signed by Chief Steward, Kevin Saylor (undated), which alleged that, "[w]ithin the past six months, the [Entergy] has maintained, enforced, rules and policies which are unlawfully overbroad. These policies include, but are not limited to, Code of Entegrity and Discrimination and Harassment Prevention." On September 30, 2015, with Amaral's Amended Charge and a Charge that bootstrapped separate rules

challenges, the Region issued a Complaint and Notice of Hearing, alleging unlawful policies demanding "respect[ful]" conduct in both the Code of Integrity [sic] and Discrimination and Harassment Prevention Policy. (General Counsel's Exhibit 1, at (e)).

The notion that the Union initiated its own challenge to the policies requiring "respect" in the workplace cannot be squared with the fact that the Union maintains a website that states:

> UGSOA Local 25 is a labor union, committed to ensuring that our members receive fair treatment, job security, competitive wages, adequate health care coverage, dignity, and **respect in the work place**. Our members are dedicated to safeguarding Pilgrim Nuclear Power Station in Plymouth MA.

(Respondent's Exhibit 15) (emphasis added). Even more unbelievable is the idea that the Union drove policy challenges to "respect" in a nuclear workplace, thereby disavowing the Union's own collective bargaining agreement that includes as the first article, a "Statement of Mutual Goals," wherein the credo of the relationship between Entergy and the Union is based on the "agree[ment] that the formula for future success is based on consultations, *mutual respect*, open communication, shared success and innovative problem solving which allows the Company through competitive excellence to sustain its continued growth." (Respondent's Exhibit 14 at p. 6) (emphasis added).

As investigation continued, soon there was simply no connection to Amaral, but rather a "feeding frenzy" on Respondent's rules about which Amaral and the Union had no motivation to challenge. It was no surprise that on December 3, 2015, yet another amended charge was filed, this time by UGSOA International President,

Desiree Sullivan ("Sullivan") (01-CA-158947) alleging that "[w]ithin the past six months, the above named Employer has maintained, enforced, rules and policies which are unlawfully overboard. These policies include, but are not limited to, Code of Integrity [sic], Discrimination and Harassment Prevention, and Employee Use if Internal and External Social Media Sites." (General Counsel's Exhibit 1(l)).

Inching beyond the Amaral case in increments,[7] the General Counsel would have the ALJ believe that the Union started to include policy challenges that had no nexus with Amaral whatsoever. Here, newly including the "Employee Use if Internal and External Social Media Sites," the General Counsel contends that the Union—without any correspondence to the Region—chose to begin challenges to policies that they had worked under and accepted as part of their collective bargaining relationship with Entergy spanning nearly a decade.

On December 31, 2016, the Region issued an Order Consolidating Cases, lifting any veil on the fact that a rules case had been created out of whole cloth, and subordinating the underlying Amaral discipline charge. The Consolidated Complaint took not only the rules that were applied to Amaral, but bootstrapped Employee Use of Internal and External Social Media Site, Company Information and Confidential Information, Company Property, Communications and Government Investigations. All of these additional policy challenges bore no

[7] On the same day Sullivan filed an Amended Charge, she also filed a new charge alleging that, "[w]ithin the past six months, the above named Employer has maintained, enforced, rules and policies which are unlawfully overbroad. These policies include, but are not limited to, Entergy System Policies & Procedures – Protection of Information." (General Counsel's Exhibit 1(s)).

relation to the Amaral discipline that was the basis of the original underlying charge.

On March 31, 2016, the Union ostensibly filed what would be the last Amended Charge (01-CA-165432), which alleged, that, "[w]ithin the past six months, the above named Employer has maintained, enforced, rules and policies which are unlawfully overbroad. These policies include, but are not limited to, Entergy System Policies & Procedures - Protection of Information, Entergy System Policies & Procedures – Government Investigations, Entergy System Policies & Procedures – Issue Resolution." (General Counsel's Exhibit 1(u)). If the lineage of charges, amendments and new charges by the Union (which was otherwise content with Entergy policies for almost a decade), is not suspicious enough, the last Amended Charge revealed that the Union was filing a charge on the "Issue Resolution" policy, which—*on its face*—does not apply to Union employees. In fact, the General Counsel would have Your Honor believe that the Union took an interest in a policy that states on its first page:

> This Policy provides all regular full-time Non-Bargaining Employees who are not in a Supervisory Position with a process to raise and resolve Issues and to seek redress while ensuring proper treatment to employees who use the process.
>
> An Issue Resolution Panel consists of five Non-Bargaining Employees who are trained to hear, investigate, and decide Issues brought to it. An employee who seeks to resolve a disputed Issue and elects to pursue resolution with a Panel will present his/her case before the Panel.

(General Counsel's Exhibit 15(f)).

The Issue Resolution Policy goes on to state in bold, capitalized lettering on the second page:

> **THIS POLICY APPLIES TO ANY AND ALL NON-SUPERVISORY, NON-BARGAINING EMPLOYEES OF ANY ENTERGY SYSTEM COMPANY, UNLESS OTHERWISE EXPRESSLY EXCLUDED.**

Id. (emphasis in original).

What reason would the Union have to file an unfair labor practice charge challenging a policy that: a) expressly does not apply to unionized employees at Entergy; and b) if applicable, would have supplanted the parties' CBA and the bargained-for grievance and arbitration procedure? Even without the suspicious chronology and transmogrification of this case, *it cannot be explained that the Union filed a charge on a policy that did not apply to its members and would have diluted their rights, if it had.*

With the last Amended Charge, there is little doubt that the charges at issue in this case developed because the Region seized "carte blanche to expand the charge as [it] might please" *NLRB v. Fant Milling Co.*, 360 U.S. at 309.

Here, faced with an impossible-to-ignore pattern, the Respondent lodged an affirmative defense calling for the dismissal of the allegations in the Complaint "because the NLRB does not have the authority to initiate the investigation of employer policies or institute charges on its own." (General Counsel's Exhibit 1(yy)). Despite the fact that the Respondent was denied the opportunity to develop a factual record regarding the Charging Party and Union's disinterest in the rules

challenge,[8] the standing of the Region to initiate a charge on its own, renders the policy challenges in this case to be infirm and subject to dismissal.

The chronology of the charges and nature of the policy challenges in the charges themselves makes it clear that the rules case was not being driven by Amaral or the Union.[9] This is further supported by the *non-response by the Union to the Respondent's subpoena*. Respondent requested "[a]ll documents, including but not limited to electronic mail, memoranda, notes, Position Statements, transcriptions of voicemails, text messages, and any other correspondence between the UGSOA and the Region regarding the subject matter alleged in the Charges" as well as the any documents associated with particular policy challenges referenced in the Complaint (Respondent's Exhibit 1). *On these requests, the Union produced no documents*. On additional requests for "[a]ll documents, including but not limited to electronic mail, memoranda, notes, Position Statements, transcriptions of voicemails, text messages, and any other correspondence between the UGSOA and the Region regarding the Respondent" and "[a]ll documents, notes, memoranda, or any other correspondence prepared by the UGSOA regarding the subject matter alleged in the Charges." Again, *the Union produced no documents*. (Tr. 10-14; Respondent's Exhibit 1). Counsel for the Union confirmed on the record that the Union produced only seven pages of documents, which were not responsive to the categories reflecting the rules portion of the case. (Tr. 10–14). Neither was any petition to

[8] On October 19, 2016, the Respondent filed a Request for Special Permission to Appeal on this issue. The General Counsel filed an Opposition on October 21, 2016. The Request remains pending as of filing.

[9] *See supra*.

revoke filed. This, the entire universe of documents is in fact a null set, leading to the inevitable conclusion that the rules case was neither initiated nor pursued by any charging party as required by Section 10(b) of the Act.

As Member Miscimarra recently pointed out, respondents may interpose a defense "to the extent that any charge allegations regarding alleged overly broad handbook provisions were initiated by representatives of the Board or the General Counsel." *AutoZone, Inc.*, 10-CA-169095 (Jun. 24, 2016) (citing *Allied Waste Services of Massachusetts, supra).* And, where there is a dispute regarding the Region's role concerning the complaint's allegations, "the judge should resolve these competing arguments in the first instance based on an evidentiary record to be developed in the hearing." *Leukemia and Lymphoma Society*, 363 NLRB No. 123, slip op. at 1–2 (2016) (Member Miscimarra, concurring).

If there is any case that calls out for the Region and General Counsel to be subject to a dismissal for initiating charges on a rules case in which there was no interested charging party, this is that case.

V. Conclusion

For all of these reasons, and on the Record as a whole, the Complaint should be dismissed in its entirety.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

In the Matter of : ENTERGY NUCLEAR OPERATIONS, INC., Respondent, And UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, INTERNATIONAL UNION, LOCAL 25, Charging Party.	CASE: 01-CA-153956 01-CA-158947 01-CA-165432

Certificate of Service

Pursuant to Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the undersigned certifies that the foregoing Post-Hearing Brief was served via electronic mail on this 6th day of December, 2016 upon the following:

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